

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Implementation of Section 621(a)(1) of)	
the Cable Communications Policy Act)	MB Docket No. 05-311
of 1984 as amended by the Cable)	
Television Consumer Protection and)	
Competition Act of 1992)	
)	

COMMENTS OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES

The New Jersey Board of Public Utilities (“Board”) submits the following comments in response to the Notice of Proposed Rulemaking (“NPRM”) released by the Federal Communications Commission (“Commission”) on November 18, 2005, under MB Docket No. 05-311, concerning implementation of Section 621(a)(1) of the Communications Act of 1934, as amended (the “Communications Act” or the “Act”). Section 621(a)(1) of the Act, codified as 47 U.S.C. § 541(a)(1), provides that a franchising authority “may not unreasonably refuse to award an additional competitive franchise.” In the request for comments, the Commission seeks input to assist in a review of the need and scope of action on the part of the Commission as it relates to the awarding of additional franchises, whether the franchising process unreasonably impedes the achievement of a competitive cable environment, and how, if it exists, the Commission should address the problem. The Board, as the local franchising authority (“LFA”) in the State of New Jersey, therefore appreciates this opportunity to provide

comments in support of the existing franchising scheme in New Jersey and to provide further options and elements that the Commission should consider prior to taking any formal or informal action on this topic.

While the Board, as the LFA, does not have information as to all of the elements raised by the Commission, the Board is able to provide empirical evidence and data on the following issues:

Q. How many franchising authorities are there nationally?

A. In New Jersey, there are currently seven cable companies and Verizon New Jersey has begun the process to enter into the cable television marketplace.

Q. How many franchises are needed to reach 60 to 80 percent of cable subscribers?

A. Currently, New Jersey has 562 municipal based franchise areas, 4 unfranchised municipalities, and 4 federal franchises, including military bases, resulting in a total subscriber number of 2.5 million. 493 of these municipalities have a cable penetration, based upon homes passed, of greater than 60%, and the overall average for the State is 70% penetration. Based upon these numbers, a competitive service provider would need to franchise 119 municipalities to serve 60% of cable subscribers in the State and 227 municipalities to serve 80% of cable subscribers.

Q. In how many of these franchise areas do new entrants provide or intend to provide competitive video services?

A. Since 1992, five competitive franchises have been sought at the State level, and all five have been granted. Of these, only two franchises resulted in service to customers; Hometown Online in Vernon and West Milford Townships. The State has one other competitive franchisee – US Cable of Paramus-Hillsdale, which has been in direct competition with Cablevision in Paramus and Hillsdale since the late 1970s.

Verizon New Jersey (“VNJ”) has, since 1993, been obligated to upgrade its network for 100% broadband capability throughout its New Jersey service territory by 2010, and competition from other providers, particularly those providing VoIP (Voice over Internet Protocol) service, has encouraged Verizon to upgrade their network. Thus, VNJ has been deploying fiber to the home throughout New Jersey since early in 2005. In sum, VNJ has announced its plans to build its fiber network in 123 New Jersey communities in 10 counties, with the expectation of further expansion in the event of a granting of a “statewide” franchise.

Q. Are cable systems generally equivalent to franchise areas?

A. No. There has been an ongoing move in New Jersey for the cable companies to consolidate multiple franchises into single cable systems, with a unity of billing, customer service and oversight. This consolidation is expected to continue.

Q. To what extent does the regulatory process involved in obtaining franchises – particularly multiple franchises covering broad territories, such as those today served by facilities-based providers of telephone and/or broadband services – impede the realization of our policy goals?

A. Franchising in the State of New Jersey is a joint process: the local municipality has initial control over the use of the public rights-of-way and negotiates the municipal consent under which a cable television operator receives a non-exclusive franchise for the political subdivision. N.J.S.A. 48:5A-22. Once the municipality has exercised its authority, the Board, as the federally recognized local franchising authority, 47 U.S.C. § 522(10); 47 U.S.C. § 543, reviews the actions of the municipality and ensures compliance with State and federal cable requirements. N.J.S.A. 48:5A-17. The Board, in this oversight role, ensures that the demands of both parties, the municipality and the cable operator, are reasonable and within the scope of the relationship. Further, the Board, under N.J.S.A. 48:5A-17, has the ability to issue a franchise even if a municipality has denied a municipal consent based upon a finding that the denial was arbitrary and capricious.

This process is currently being considered by the State Legislature, and two bills have been introduced in the current legislative season, A804 and S192, which would provide for some element of streamlining to the franchising process. While no particulars are yet available, New Jersey expects to remain on the forefront of providing a competitive and open franchising environment.

Q. Are potential competitors obtaining from LFAs the authority needed to offer video programming to consumers in a timely manner?

A. The Board is the LFA in New Jersey, and the various legislative elements of both the current and the possible amended State Cable Act provide for relatively quick decisions as to franchising. While VNJ has only recently filed for competitive

franchises, prior applications have been moved through the process in an expedited manner. For example, as has been noted in a recent filing by a cable operator to the Commission, the New Jersey Board of Public Utilities has “taken a positive stance in regards to promoting competition in the Video marketplace.” Comments filed with the Commission in Docket CS 02-145 by Hometown Online, dated Aug. 13, 2002, at 4. This statement flowed from the quick turn-around in providing Hometown Online, an affiliate of Warwick Valley telephone, a competitive service provider, a franchise for Vernon Township in just five months, as opposed to a delay of over a year in another jurisdiction.

Q. What is the impact of state-wide franchise authority on the ability of the competitive provider to access the market?

A. The current New Jersey system provides a state-wide franchise authority that ensures a consistent tone and enforcement of franchising requirements such as to ensure that all video entities, both competitive and incumbent, have an opportunity to access the market. The Board’s role is to ensure a uniform and equitable enforcement and application of franchising requirements, and the Board has been successful in this task.

Q. Is there evidence that such state-wide franchises are causing delay?

A. New Jersey has no experience with state-wide franchises at this time, although, as noted above, the State’s legislature is currently considering two bills that would provide for state-wide franchising.

New Jersey is, however, familiar with the delay that can be caused by the renewal process, as guided and set by the Commission. Renewals of existing franchises take in excess of 36 months, and the Board would support Commission action to streamline this process.

Q. What impact has state-level legislative or regulatory activity had on the franchising process?

A. New Jersey believes that the state-level activity has been of benefit to the cable operators, competitive entities, and customers, as it has ensured a consistent and equitable framework for access franchises, although few entities have taken advantage of this opportunity.

Q. Are competitors taking advantage of new opportunities provided by state legislatures and regulators?

A. While no new regulations or statutes have yet been enacted on this topic in New Jersey, VNJ has indicated its interest in a state-wide franchise process.

Q. How many competitive franchises have been awarded to date?

A. Since 1992, five competitive franchises have been sought at the State level, and all five have been granted.

Q. How many competitive franchises have potential new entrants requested to date?

A. As of February 8, 2006, the Board has received seven applications for traditional franchises.

Q. How much time, on average, has elapsed between the date of application and the date of grant, and during that time period, how much time, on average, was spent in active negotiations?

A. For new applications, the individual municipalities must act within 150 days (with an additional 60 days if necessary) to finalize the process before the Board can act. Competitive franchises are normally expedited at the Board and granted within 60 to 90 days of action by the municipality. With those applications currently at the municipal level, the Board expects certification by September, 2006.

For renewals of existing franchises, however, the timeframe is significantly longer. At a minimum, under current Commission regulations, the renewal process is designed to take 36 months. The Board would be interested in Commission action to decrease this timeframe.

Q. How many applications have been denied?

A. None.

Q. How many negotiations are currently ongoing?

A. As of February 8, 2006, negotiations on the municipal level are ongoing for five applications.

Q. Are the terms being proffered consistent with the requirements of Title VI?

A. Yes.

Q. How has the cable marketplace changed since the passage of the 1992 Cable Act, and what effect have those changes had on the process of obtaining a competitive cable franchise?

A. The single most significant change in the marketplace has been the convergence of cable and telephone service, with traditional cable companies offering communication services and traditional telephone companies seeking to offer video products. This convergence is one of the foundations of the ongoing legislative consideration here in the State.

Q. What problems have cable incumbents encountered with LFAs?

A. Applications for certification by the Board which are complete without deficiencies and comport with federal and state laws encounter no problems with the Board, the local franchising authority in NJ.

Q. Should cable service requirements vary greatly from jurisdiction to jurisdiction?

A. LFAs may well have considerations such that a single federal policy would be inappropriate. New Jersey, as one of the most densely populated States, has a different set of concerns and problems than might be found in a less populated State with different geographic densities. Likewise, New Jersey has a diversity of income and cultures such that local jurisdiction is necessary and appropriate – the Commission

simply can not be expected to have the same level of understanding of specific New Jersey issues. Finally, LFA regulation ensures that the customer service and consumer protection elements of regulation are directly tailored to the customers of the State.

Q. Are certain cable service requirements no longer needed in light of competition in the MVPD marketplace?

A. The Board believes that the State must continue to play a key role in customer service and consumer protection of all video service providers, and that the current state of competition is not yet sufficient to allow for a decrease in regulatory oversight as to these issue. Customers expect government in general and the Board in particular to play an active role in ensuring customer service and consumer protection regulations over video providers such that continued regulation and control is necessary and proper.

Q. To what extent are LFAs demanding concessions that are not relevant to providing cable services?

A. This is not an issue in New Jersey because the Board, as the local franchising authority, does not force “concessions” on any provider which are inconsistent with federal guidelines and requirements for the provision of cable services.

Q. Comments on “level-playing-field” statutes

A. The Board believes that a level playing field is the minimum basic requirement for an effective competitive environment. In a technologically-neutral franchise world, all

entities should be held to the same customer service and consumer protection standards to ensure that no one provider has an unfair advantage. To that end, a requirement that all video providers satisfy the same requirements should be a condition of any eventual franchise process. The current system in New Jersey provides this conformity through the negotiation process while it is expected that any proposed “statewide franchise” bill would make this element explicit.

Q. Legal foundation for the Commission to become the “franchiser of last resort.”

A. The Board shares the concern of the Commission over the question as to whether the Commission has the legal authority to impose franchises upon local entities or other LFAs. While the Commission may well have the ability to provide guidance and oversight, the actual issuance of a franchise has traditionally been reserved, under the Act, to the LFAs. See, e.g., City of Dallas v. FCC, 165 F.3d 341, 347 (5th Cir. 1999). Accordingly, the Commission must be highly circumspect in placing itself into the position of effectively or ultimately operating as a LFA by being the “franchiser of last resort.” Furthermore, as has been discussed above, the competitive and regulatory situation in New Jersey is such that the Commission need not take any steps to ensure open and competitive access – the State has and will continue to ensure that New Jersey is a viable environment for competition. This, coupled with the Commission’s current oversight, is a sufficient regulatory environment to ensure competition such that additional action by the Commission would be unnecessary and counterproductive.

Q. How to define an unreasonable refusal to award an additional competitive franchise under Section 621(a)(1).

A. The Board agrees that both an actual and a *de facto* test for unreasonable refusal is appropriate, but cautions the Commission to ensure that any definition that includes elements of delay does not open the process to gamesmanship by any entity involved in the process.

Q. What, if any, specific rules, guidance or best practices should the Commission adopt to ensure that the local cable franchising process does not unreasonably impede competitive cable entry?

A. None.

Q. Should the Commission establish higher standards for “reasonableness” with respect to entities that already have franchises that authorize the use of public rights of ways?

A. No. A true level-playing-field should be just that – equal for all parties. Franchising requirements should be neutral as to the technology used and the nature of the entity seeking the franchise.

Q. Do build out requirements create unreasonable barriers to entry for facilities-based providers of telephone and/or broadband services?

A. New Jersey provides for a “reasonable” amount of time to provide service throughout a franchise area, and the risk of “fiber to the rich” noted by the Commission

in the NPRM makes clear the need for non-market based requirements for build out. Under the current New Jersey system, a competitor may select those municipalities where full build out makes appropriate economic sense such that the requirement does not impede entry from a regulatory point of view. Under the current bills pending before the State Legislature, build-out requirements are a significant issue that, while subject to different approaches, will nevertheless be addressed.

Q. Is it appropriate for the Commission to preempt state-level legislation to the extent it finds it serves as an unreasonable barrier to the grant of competitive franchises?

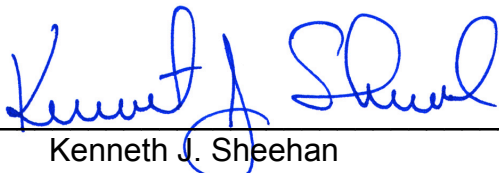
A. No. The Board does not believe that preemption as to any New Jersey state statute or regulation is appropriate, necessary, warranted or authorized at this time.

Based upon the responses above, the Board strongly disagrees with the predicate foundation of the Commission's NPRM – that the Commission should serve as a “franchiser of last resort.” In New Jersey, this is simply unnecessary, as both the Board as the LFA and the Legislature have and continue to address the changing needs within the State. No entity that has applied for a competitive franchise has been refused one, and no entity in the State has been subject to any process beyond that provided for in the State's Cable Act, N.J.S.A. 48:5A-1 et seq. In light of the lack of authority of the Commission to act, and the State's ongoing legislative review, it is respectfully stated that the Commission need take no action at this time. If the Commission, based upon other elements in other jurisdictions nevertheless finds action is necessary, the Board

would call upon the Commission to ensure that any action taken ensures that New Jersey maintains its control over franchise issues.

Respectfully submitted,

Zulima V. Farber
Attorney General of New Jersey

By: 
Kenneth J. Sheehan
Deputy Attorney General
On behalf of the New Jersey Board of
Public Utilities